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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE CARLOS ALFARO, Defendant and Appellant.	B159988 (Los Angeles County Super. Ct. No. TA101870)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Roy C. Preminger, Deputy Attorney General, for Plaintiff and Respondent.

Jose Carlos Alfaro appeals from the judgment entered following his conviction by jury of committing a lewd act upon a child (Pen. Code, § 288, subd. (a)).[1] He was resentenced to prison for six years.

In this case, we hold the trial court properly refused to grant probation to appellant.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence[2] established that at about 9:00 a.m. on Sunday, June 5, 1999, Amaris A., who was 11 years old, was watching cartoons in the living room of her godmother's large house in Gardena. Appellant was the godmother's brother, and lived in the garage in back of the house. Amaris A.'s godbrother watched television for awhile with Amaris A. but later went to his room, leaving her alone in the living room. There were three bedrooms in the house, and all of their doors were closed. Amaris A. testified the bedrooms were "around the living room" but "there is like a wall and a door and then there is the rooms." (*Sic*.)

Amaris A. had been alone in the living room for about five minutes when appellant entered. Amaris A. thought the back door had been open; she did not hear anyone knock on the door. Appellant sat down near Amaris A., and later pulled her seat towards him. Appellant "sort of whisper[ed]" to Amaris A., and later rubbed his hand against Amaris A.'s vagina through her clothes. Appellant then kissed her, trying to put

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1 This is appellant's second appeal. In his previous appeal (*People v. Alfaro* (B141510) May 2, 2001 [nonpub. opn.]), we held, inter alia, that the trial court reversibly erred by relying on Penal Code section 1203.066, subdivision (a)(3), to conclude appellant was statutorily ineligible for probation, when said ineligibility was neither alleged in the accusatory pleading, nor admitted by appellant or found true by the trier of fact as required by Penal Code section 1203.066, subdivision (d). We vacated appellant's eight-year prison sentence, remanded the matter for resentencing, but otherwise affirmed the judgment.

2 The factual summary is taken in part from the recitation of facts in the background section of the opinion in appellant's previous appeal. (See footnote one, *ante*.)

his tongue in her mouth. Amaris A. went to her godsister's room and made a lot of noise to awaken her. Appellant presented no defense evidence.

CONTENTION

Appellant contends "[t]he trial court erred and abused its discretion in denying appellant probation, based upon factors inherent in the offenses, such as the victim's age-based vulnerability, and the seriousness of the offense."

DISCUSSION

The Trial Court Properly Refused To Grant Probation.

1. *Pertinent Facts.*

The information filed December 30, 1999, alleged, inter alia, that appellant committed two lewd acts upon a child, the first, on and between January 1, 1995, and January 1, 1996 (count two), the second, the previously discussed June 1999 offense (count one). The preconviction probation report prepared for a December 30, 1999 hearing reflects that appellant was born in March 1963. In October 1989, appellant was convicted of driving under the influence of alcohol and placed on probation for three years. Appellant was alleged to have possessed a controlled substance in February 1997, in violation of Health and Safety Code section 11350, subdivision (a). In that case, in April 1997, entry of judgment was deferred and, in October 1998, the case was dismissed.

Apart from the facts pertaining to counts one and two, the probation report also reflects that Maria M. told police that appellant had kissed her 12- or 13-year-old daughter two or three times one evening.

The probation officer stated, "It seems clear from what is presented by the Los Angeles Police Department's investigation . . . that the defendant has a history of committing sexually lewd acts with children. The probation officer strongly feels that this type of criminal conduct being committed by the defendant is wrong, and he clearly poses an immediate threat to the safety and well-being of children in the community. The defendant should not be allowed to return to the community under probation supervision because of the fear that he will probably continue to sexually assault children. Therefore,

if defendant is found guilty of any of the felony charges, the court should deny the defendant probation and proceed to sentence him to a term in state prison." The probation officer concluded appellant was eligible for probation, and there were no aggravating or mitigating factors. However, the probation officer recommended that appellant be imprisoned, noting he could be imprisoned for the "mid-base term."

The evidence presented at appellant's March 2000 trial as to the previously discussed June 1999 offense alleged in count one is set forth in the factual summary *ante*. As to count two, evidence was presented at trial that in September or October 1995, appellant was living with Maria M. and her three-year-old daughter. One night during that period, the daughter was wearing underwear and appellant had his hand inside the underwear. Appellant presented no defense evidence as to the 1995 act.

Propensity evidence was also presented at trial. Specifically, evidence was presented that on July 4, 1999, Amaris A. was on vacation with her family, other people, and appellant. On one occasion when Amaris A. and appellant were alone, appellant rubbed her chest under her clothing. Appellant was convicted on count one but acquitted on count two.

Following appellant's conviction, the People filed, on March 14, 2000, a sentencing memorandum. The People urged appellant was statutorily ineligible for probation[3] and, in any event, based on the evidence presented at trial, he was unsuitable for probation. The memorandum urged that appellant be sentenced to prison for eight years.

Following remand,[4] appellant prepared a sentencing memorandum dated January 23, 2002. The memorandum requested that appellant be placed on probation. The memorandum noted appellant did not use a weapon during the present offense; the victim suffered no financial loss; appellant's prior criminal history was minimal and did

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3 See footnote one, *ante*.

4 See footnote one, *ante*.

not involve violence; and nothing indicated his performance on probation was unsatisfactory.

The memorandum also noted that appellant was willing to cooperate with probation; he was able to comply with reasonable terms of probation; imprisonment would cause hardship on his family; and there was no indication he would be a danger to others if not incarcerated. The memorandum observed that it was "extremely unlikely that [appellant] will present a danger to society." Various character letters were attached to the memorandum. The memorandum recommended that appellant be ordered to participate in an outpatient counseling program.

A psychologist's report addressed to appellant's counsel reflects the psychologist evaluated appellant pursuant to Evidence Code section 730 and Penal Code section 288.1. The report reflects as follows. Appellant told the psychologist, as to count one, that appellant made a "'mistake.'" He denied he had been sexually aroused during the incident. Appellant had drunk about a pint of hard liquor every two weeks since he was 17 years old. He drank excessively for one year after learning his wife in El Salvador went with another man. Appellant used cocaine about twice a month for about two years.

The report discussed appellant's psychosocial adjustment, sexual offenses, and future plans.[5] Based on that discussion, the report concluded, "the likelihood that

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[5] The report reflects, "The following is an analysis related to the sexual violent risk, which is divided into three major areas: the psychosocial adjustment, the sexual offenses, and future plans. [¶] Regarding the (*sic*) Mr. Alfaro's psychosocial adjustment and the legal documents reviewed by this examiner, Mr. Alfaro engaged in sexual deviation. He was not the victim of child abuse, which is a general risk factor for criminality. The psychopathy checklist also revealed Mr. Alfaro does not have psychopathy. In fact, based on the social history provided to this examiner, he tends to be a sensitive man; in particular, he is very sensitive and responsive to the needs of his family. He does not suffer from major mental illness, alcoholism, or from dependence on illicit, illegal drugs. [¶] Mr. Alfaro does not have a history of suicidal, or homicidal, ideation, thoughts, or plans. He seems to have good relationship abilities. He has not had employment problems, inasmuch as he has been productive in this country, as well as in his native El Salvador. Mr. Alfaro's past legal history does not involve violence, such as robberies, assaults, etc. It also does not involve nonviolent offenses, such as theft, fraud, etc.

Mr. Alfaro will reoffend is virtually nil. He is recommended for probation, but he needs to [be] engaged in a program, . . . for sexual offending . . . ."

At resentencing on June 19, 2002, the court indicated it had read the preconviction probation report, the parties' sentencing memoranda, the transcript of the original sentencing hearing, and the psychologist's report. The prosecutor asked that the court consider those documents in light of California Rules of Court, rule 414, pertaining to criteria affecting probation.

Appellant urged the psychologist's report was erroneous to the extent it indicated that appellant had molested two children other than Amaris A.; appellant noted he had been acquitted on count two. Appellant also noted the incident involving the 12- or 13-year-old happened "sometime earlier, . . ." Appellant urged the report reflected he was not a pedophile; he had shown remorse; he had family support; and he was not a danger. Appellant's counsel stated, "I believe that [appellant] should receive a state prison sentence with suspended time and be placed on a grant of probation. And the reason for that is because he has served so much time in jail already."

The prosecutor observed that the probation report had recommended that probation be denied. Discussing California Rules of Court, rule 414, the prosecutor argued Amaris A. was vulnerable (rule 414(a)(3)); Amaris A. suffered emotional injury

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Mr. Alfaro was on probation after he had a DUI, which he successfully completed. [¶] Thus, in summary, Mr. Alfaro's psychosocial adjustment is adequate and not suggestive of future problems, should he be placed on probation. [¶] Regarding the sexual charges, there was no high frequency of sexual misconduct, nor any multiple-offense types, such as different categories of victims, i.e., female, male. Mr. Alfaro did not produce physical harm to the victims, nor did he use weapons or threats of death. There was no escalation in the frequency or severity of the alleged sexual misconduct. Mr. Alfaro may have minimized his participation in the instant charges. However, he did not attempt to deny the incident with which he was charged the last time. Most importantly, he expressed attitudes that do not support such sexual misconduct. [¶] In summary in this area, there are no major factors that would add to Mr. Alfaro's risk to reoffend. [¶] With regard to the last area, which is future plans, based on Mr. Alfaro's reported future plans, he impressed as being realistic about his plans when he is released from jail. In addition, on his own volition, he stated he is ready for psychological intervention when he is released."

(rule 414(a)(4));[6] appellant was an active participant (rule 414(a)(6)); this was not a situation in which he was not likely to reoffend (rule 414(a)(7)); he took advantage of a position of trust (rule 414(a)(9)); his criminal record reflected increasingly serious conduct (rule 414(b)(1)); he had performed unsatisfactorily in rehabilitation programs (rule 414(b)(4));[7] he had not shown remorse (rule 414(b)(7)); and he would be a danger to others if not imprisoned (rule 414(b)(8)).

The court stated, "evaluating the standards for probation under [rule 414] of the California Rule[s] of Court, either the pro or the con evaluation, . . . I think he's eligible. I just don't think it would be a proper probation sentence." The court stated, "I think that there are just too many factors as listed in our standards, the vulnerability of the victim, the fact that he was an active participant. The seriousness of the crime . . . these crimes with small children like that I think are very serious. And . . . I think that's a significant factor that lays in the court's mind.

"I do believe he took advantage of a position of trust by being a guest of the house. And I do believe that he did inflict significant emotional injury on the little girl relating to the count that he was convicted on. [¶] Weighing the other side, the pro sides, I don't think his criminal record is that significant as far as anything that would -- I think that works in his favor. And I have no reason to believe based on [the psychologist's] report that everyone is believing that he's not willing or able to comply with any probation. But I think the other factors outweigh that. So I am going to deny probation. And we are going to resentence him to the state prison." The court resentenced appellant to prison for six years.

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6 The prosecutor noted there were multiple occasions of molestation of Amaris A. and the incidents split her family.

7 The prosecutor noted appellant's past substance abuse and that appellant had been under the influence of alcohol during the present offense.

2. *Analysis*.

A trial court has broad discretion to determine whether a defendant is suitable for probation (*People v. Welch* (1993) 5 Cal.4th 228, 233), and a defendant bears a heavy burden when attempting to show that the court has abused that discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) A court commits an abuse of discretion by denying probation when the court's determination is arbitrary, capricious, or beyond the bounds of reason. (See *People v. Warner* (1978) 20 Cal.3d 678, 683.) Moreover, a single aggravating factor may support the denial of probation (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615), and the court is presumed to have considered relevant criteria in the California Rules of Court pertaining to the grant or denial of probation absent a record affirmatively reflecting otherwise. (Cal. Rules of Court, rule 409.)

In denying probation, the trial court relied on the factors that appellant was an active participant (Cal. Rules of Court, rule 414(a)(6)), and took advantage of a position of trust to commit the offense (rule 414(a)(9)). Appellant does not expressly dispute the validity of the court's reliance on these two factors. The denial of probation was valid based on either of these two factors alone. (Cf. *People v. Robinson*, *supra*, 11 Cal.App.4th at p. 615.)

Further, notwithstanding appellant's suggestion to the contrary, emotional injury is not an element of a violation of Penal Code section 288, subdivision (a),[8] and the trial court did not err by relying on the factor that appellant inflicted emotional injury on the victim to deny probation. (Cal. Rules of Court, rule 414(a)(4).) Further still, the trial court properly relied on the seriousness of the offense as a factor to deny probation. (Cf. *People v. McLaughlin* (1988) 203 Cal.App.3d 1037, 1040.)

Although the fact that a victim is a minor cannot be used as a factor in aggravation

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[8] That statute states, "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony."

where, as here, the victim's minority is an element of the offense, this does not mean that the factor of victim vulnerability under California Rules of Court, rule 414(a)(3), is never available as an aggravating factor to support the denial of probation in cases involving offenses in which the victim's minority is an element of the offense. A minor victim's particular vulnerability can be used in appropriate circumstances even if the minor's age is an element of the offense. (*People v. Robinson*, *supra*, 11 Cal.App.4th at p. 615.)

In the present case, Amaris A. was watching television alone on a Sunday morning in a large house where people were sleeping. Appellant entered the living room, spoke quietly to her, and touched her vagina through her clothing. The doors to the surrounding bedrooms were closed, diminishing detection of appellant's acts, and Amaris A. suggested the bedrooms were separated from the living room by a wall. The trial court properly relied on the vulnerability of the victim as a factor to deny probation. (Cal. Rules of Court, rule 414(a)(3).)

The court read the probation report, the parties' sentencing memoranda, the transcript of the original sentencing hearing, and the psychologist's report. The court also heard argument of counsel,[9] and expressly considered California Rules of Court, rule 414. We reject appellant's claim that the court's comments indicate that the court agreed with the psychologist that appellant had no danger of reoffending. Appellant has failed to demonstrate that the court abused its discretion by denying appellant probation. (See *People v. Warner*, *supra*, 20 Cal.3d at p. 683.)

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9 We note at one point appellant's counsel commented, "I believe that [appellant] should receive a state prison *sentence* with suspended time and be placed on a grant of probation." (Italics added.)

DISPOSITION

The judgment is affirmed.

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CROSKEY, Acting P.J.

We concur:

KITCHING, J.

ALDRICH, J.